

## Articles

### DEFENDING JUDICIAL SUPREMACY: A REPLY

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In *On Extrajudicial Constitutional Interpretation*,<sup>1</sup> we put forth and defended the position that the Supreme Court's interpretations of the Constitution should be taken by all other officials, judicial and non-judicial, as having an authoritative status equivalent to the Constitution itself. We argued, to put it starkly, that "the Constitution is what the judges say it is"<sup>2</sup> may well be bad jurisprudence because it is incomprehensible as an attempt to explain what it means to argue *to* the Supreme Court,<sup>3</sup> but that it is nonetheless a desirable attitude for non-judicial officials to have towards the Court and its product, in much the same way, but far less controversially, that it is a desirable attitude for lower court judges to have towards the Court and its opinions.<sup>4</sup>

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1. Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359 (1997).

2. Charles E. Hughes, *Addresses and Papers* 139-41 (Knickerbocker Press, 1908).

3. See Ronald Dworkin, *Law's Empire* 36-37 (Belknap Press, 1986); H.L.A. Hart, *The Concept of Law* 124-54 (2d ed. 1994).

4. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817 (1994); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1 (1994); Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571 (1987).

This position, commonly associated with the Supreme Court's opinions in *Cooper v. Aaron*,<sup>5</sup> and, more recently, in *City of Boerne v. Flores*,<sup>6</sup> has long been subject to withering criticism. Some of this criticism has come from academics,<sup>7</sup> but even more has come from officials of the executive and legislative branches of government who see little reason to take their own interpretations of the Constitution as being subject to override or nullification just because of a prior claim by a branch of government—the judiciary—that is given no interpretative priority in the constitutional text itself.<sup>8</sup> The raw assertion of judicial supremacy in the task of interpreting the Constitution, so the critics of *Cooper* and *City of Boerne* have insisted, is unsupported by history, un-

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5. 358 U.S. 1 (1958).

6. 521 U.S. 507, 536 (1997) ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed."). In important respects, *City of Boerne* presents a problem orthogonal to the one that is our primary concern, both here and in our earlier Article. *City of Boerne* is about the circumstances under which Congress, acting pursuant to its powers under § 5 of the Fourteenth Amendment, might depart from Supreme Court precedent in exercising those powers. The existence of the § 5 power makes the question one of substantive interpretation rather than one of obedience, although our arguments for stability and settlement might properly be understood as in some tension with the strong exercise of congressional power under § 5. Were the § 5 power a potentially limited one, this would be of limited moment. But as long as a vast range of potential congressional action can potentially be shoe-horned into the § 5 power, then it follows that our arguments provide substantial support for at least as much of the *City of Boerne* outcome as rejects the use by Congress of the § 5 power to directly repudiate what the Supreme Court has already determined. Although Justice Kennedy did say in *City of Boerne* that Congress "has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution," 521 U.S. at 535, it is this statement and not the outcome that is the troubling part of the opinion. To us, Justice Kennedy was merely being polite to Congress, telling a judicial social lie equivalent to complimenting losing counsel on the quality of her argument.

7. See e.g., Sanford Levinson, *Constitutional Faith* 27-53 (Princeton U. Press, 1988); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 *Hast. Const. L.Q.* 359 (1997); Sanford Levinson, *Could Meese Be Right This Time?*, 61 *Tul. L. Rev.* 1071 (1987); Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 *Harv. L. Rev.* 153, 163 (1997); Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 *Nw. U. L. Rev.* 193 (1993); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217 (1994); Mark Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry*, 26 *Val. U. L. Rev.* 437 (1992).

8. Among the most prominent of modern statements to this effect is Edwin Meese III, *The Law of the Constitution*, 61 *Tul. L. Rev.* 979 (1987). A substantially identical position, however, undergirded Abraham Lincoln's refusal to take the *Dred Scott* decision (*Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)) as universally binding. Roy P. Basler, ed., 3 *The Collected Works of Abraham Lincoln* 1-76, 102-86, 207-325 (Rutgers U. Press, 1953). And of course the same view generated a large part of the "nullification" position that produced *Cooper* itself. See Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 *U. Ill. L. Rev.* 387.

supported by the structure of our own constitutional system, and unsupported by persuasive normative arguments of political theory or institutional design.<sup>9</sup>

That *Cooper* and *City of Boerne* announce the supremacy of the Supreme Court and its interpretations of the Constitution is largely beside the point, for the Supreme Court's bald assertion of its own interpretive supremacy begs the question whether other branches and other officials, to say nothing of the public at large, should accept the consequences of that assertion.<sup>10</sup> Nevertheless, and without relying on the bootstrapping argument that the Supreme Court's assertion of its own supremacy establishes that supremacy, we argued that a central moral function of law is to settle what ought to be done. A constitution, because of the difficulty of altering it, attempts to effect a more permanent settlement of what ought to be done than do statutes and common law decisions. Where the meaning of a legal settlement, including a constitutional one, is itself controverted, it is a central moral function of judicial interpretation to settle the meaning of that (attempted) settlement. The undeniable fact that a judicial interpretation of an attempted legal settlement may be incorrect does not and should not call into question its authority, for it is inherent in all legal settlements of what ought to be done that such settlements claim authority even if those subject to them believe the settlements to be morally and legally mistaken.<sup>11</sup> Moreover, the authority of a mistaken second-order settlement of the meaning of a first-order settlement of some moral question is less problematic than the authority of the first-order settlement itself. So if we expect people to obey the Constitution

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9. For a recapitulation of the debate, and an argument for a narrow reading of what *Cooper* stands for, see Laurence H. Tribe, 1 *American Constitutional Law* 254-58 (Foundation Press, 3d ed. 2000).

10. See Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1293-94 (1996).

11. To say that settlements claim authority is to say that they purport to provide content-independent reasons for action, that is, reasons that are independent of the moral or interpretive correctness of the settlements. Typically, but not exclusively, content-independent reasons for action, such as the reasons to follow rules and the reasons to follow precedent, are a function of the balance of errors committed over time by subjects' taking the settlements as conclusive of what ought to be done as compared to those same subjects acting on their independent substantive and content-based judgments in each case. On this conception of authority generally, see H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in *Essays on Bentham: Studies in Jurisprudence and Political Theory* 243-68 (Clarendon Press, 1982); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979); Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 128-34 (Clarendon Press, 1991).

even when they morally disagree with it, we can, for the same reasons but at one remove, expect them to obey the Supreme Court's interpretation of the Constitution even when they believe that interpretation to be erroneous.

Perhaps gratifyingly, our article has in the past three years become the target for many of those who take the central claims of *Cooper* and *City of Boerne*, and the claims of judicial interpretive supremacy more generally, to be misguided. In half a dozen extended published responses,<sup>12</sup> and additional commentary contained in less targeted books and articles,<sup>13</sup> we have been seen as ahistorical defenders of Supreme Court arrogance, and equally ahistorical denigrators of the constitutional interpretive capabilities of Congress and the executive branch. To our critics, our claims of judicial supremacy represent ignorance of history, bad constitutional law, misguided institutional design, and impoverished democratic theory.

These criticisms have been thoughtful and troubling, but our aim here is not to engage in the kind of acrimonious debates between critics and "misunderstood" authors that one normally associates with the letters section of the *New York Review of Books*. Rather, we take the existence of this volume of criticism as an occasion for joining issue, and continuing a debate that goes to the central questions of the role of a constitution and the role of the courts in a democratic society.

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12. See Neal Devins and Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 Va. L. Rev. 83 (1998); Edward Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. Rev. 123 (1999); Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 Wm. & Mary L. Rev. 849 (1998); Bruce G. Peabody, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 Const. Comm. 63 (1999); Emily Sherwin, *Ducking Dred Scott: A Response to Alexander and Schauer*, 15 Const. Comm. 65 (1998); Mark Tushnet, *Two Versions of Judicial Supremacy*, 39 Wm. & Mary L. Rev. 945 (1998); see also John Harrison, *Coordination, the Constitution, and the Binding Effect of Judicial Opinions*, University of Virginia School of Law Working Papers.

13. See Mark Tushnet, *Taking the Constitution Away from the Courts* 27-29 (Princeton U. Press, 1999); William G. Buss, *Federalism, Separation of Powers, and the Demise of the Religious Freedom Restoration Act*, 83 Iowa L. Rev. 391, 429-31 (1998); Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Reflections*, 43 St. L. L.J. 791, 818-19, 833-35 (1999); Suzanna Sherry, *Justice O'Connor's Dilemma: The Baseline Question*, 39 Wm. & Mary L. Rev. 865, 903-05 (1998).

## I. THE NATURE OF THE QUESTION

### A. THE PRECONSTITUTIONAL CONSTITUTION

An essential preliminary is to consider the nature of the question we are asking when we ask whether the Supreme Court should be the supreme interpreter of the Constitution, its interpretations consequently binding on others even when their own interpretations strike them as better than the Supreme Court's. Even before we ask what the question *is*, we must ask what kind of question it is we are asking.

We frame the preliminary question in this way to make clear that we are not asking a question that can be answered from the Constitution itself. John Harrison, Edward Hartnett, Neal Devins, and Louis Fisher all devote considerable attention to the way in which we have ignored the non-designation of the Supreme Court as supreme interpreter in the Constitution itself as a dispositive datum, and have ignored as well the constitutional history explaining and supporting the view that the Constitution does not and was not intended to grant the Supreme Court supreme interpretive power over the Constitution's terms.<sup>14</sup>

We accept for the sake of argument (and also because we have no reason to doubt it) the rich historical evidence that Harrison, Hartnett, Devins, and Fisher have adduced. We thus accept that the Framers did not intend the Supreme Court to be the Constitution's supreme interpreter, that the ratifiers in the states did not understand the Supreme Court to be the Constitution's supreme interpreter, and that the text does not designate the Supreme Court as the Constitution's supreme interpreter. Consequently, we accept that such a role for the Supreme Court cannot itself be based on the Constitution textually or historically understood. Indeed, we shall go even further and assume, for the sake of argument, that the Constitution actually repudiates such a role. But we nevertheless maintain that our argument is not simply one about hypothetical systems, but one that pertains to *this* Constitution in *this* constitutional system.

We are able to make this claim, even with the assumptions we accept, because we are arguing for a *preconstitutional* norm,

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14. Devins and Fisher, 84 Va. L. Rev. at 85-90 (cited in note 12); Harrison, *Coordination, the Constitution, and the Binding Effect of Judicial Opinions* at 12-20 (cited in note 12); Hartnett, 74 N.Y.U. L. Rev. at 120-36 (cited in note 12).

a norm that determines not what was adopted *then*, but how what was adopted then should be regarded *now*. The Constitution's authority—its status as fundamental law—ultimately rests not on facts about the past, but on the Constitution's acceptance as authoritative in the present. This is a logical and not a historical point, and it is a logical point that undergirds our entire approach.<sup>15</sup>

To explain this point, which has eluded our more historically oriented critics, let us suppose, counterfactually, that the Constitution did purport to answer the question of interpretive supremacy. That is, suppose that Article VI's Supremacy Clause did not say simply and inscrutably that "This Constitution . . . shall be the Supreme Law of the Land; and the Judges in Every State shall be bound thereby . . .," but instead provided that "This Constitution shall be the Supreme Law of the Land, and the interpretations of this Constitution by the Supreme Court of the United States shall be final and binding on all other judges of the United States, on all Judges in the several States, on all Officials of the Executive and Legislative Branches of this Government, and on all Officials of each of the several States."

Even were this to be the actual text of the Constitution, the question of judicial supremacy would still remain open. Even were this the constitutional text, there would still be the question of who would interpret *this* provision, and whether that interpretation would be binding on others. Whether one puts this in terms of the Wittgensteinian commonplace that rules do not determine their own application,<sup>16</sup> or instead in terms of a Kelsenian *grundnorm*<sup>17</sup> or H.L.A. Hart's ultimate rule of recogni-

15. For a fuller exploration of this idea in a wider range of contexts, see Frank I. Michelman, *Constitutional Authorship by the People*, 74 Notre Dame L. Rev. 1605 (1999).

16. To use Wittgenstein's useful metaphor, when we see a sign that is an arrow, how do we know whether to go in the direction of the point or in the direction of the tail? Ludwig Wittgenstein, *Philosophical Investigations* ¶ 85 (Macmillan, 3d ed. G.E.M. Anscombe trans., 1958); Ludwig Wittgenstein, *The Blue and Brown Books: Preliminary Studies for the "Philosophical Investigations"* 33-34 (Basil Blackwell, 2d ed. 1969). For an application of these themes to various jurisprudential questions, see Dennis M. Patterson, ed., *Wittgenstein and Legal Theory* (Westview Press, 1992).

17. According to Kelsen, a constitution "is grounded as valid by the presupposed basic norm." Hans Kelsen, *The Function of a Constitution* (Iain Stewart trans.), in Richard Tur and William Twining eds., *Essays on Kelsen* 109, 119 (Clarendon Press, 1986). On the *grundnorm* more generally, see Hans Kelsen, *Pure Theory of Law* 3-23 (Max Knight trans., 1967); George C. Christie, *The Notion of Validity in Modern Jurisprudence*, 48 Minn. L. Rev. 1049 (1964); J.W. Harris, *When and Why does the Grundnorm Change?*, 29 Camb. L.J. 103 (1971); Julius Stone, *Mystery and Mystique in the Basic Norm*, 26 Mod. L. Rev. 34 (1963). See also Michelman, 74 Notre Dame L. Rev. at 1611-19 (cited in note

tion,<sup>18</sup> the central point is that the status of a legal text cannot ultimately, and cannot without infinite regress, be determined by that text itself. In order to determine a text's status we must go outside it. And because the text cannot answer the question of whether the text is authoritative, neither can it answer the question whether someone's interpretation of that text, including that part of the text that purports to designate an authoritative interpreter, is authoritative.

In many respects this point is more formal than real, at least as applied to our fictional text. The formal logical point we make would also apply to the question whether the word "two" in Article III, section 3, providing that "[n]o person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court,"<sup>19</sup> should in that context refer to the number 3 and not to the number 2. In a strictly logical sense, we could understand "two" to refer to 3, for the text itself cannot determine whether for the purposes of that text it shall be understood as ordinary English, in which "two" stands for 2, or as Conglish, say, in which "two" stands for 3.<sup>20</sup> No degree of textual specificity, therefore, can hope to avoid the logical necessity of leaving the text in order to establish the principles of that text's interpretation. Nevertheless, we might say that understanding the Constitution as ordinary English is itself a firmly entrenched and widely accepted preconstitutional understanding, such that interpreting "two" to mean 3 would violate one of the most firmly established of preconstitutional rules.

Yet even on our fictional example, the point is more real than it may at first appear. Interpreting the constitutional text as ordinary English turns out not to be as clear a preconstitutional rule as we might have supposed, for there are parts of our actual constitutional text that have been interpreted in plainly counter-textual ways, as with, for example, interpreting "another State" in the Eleventh Amendment to include the same state,<sup>21</sup> and perhaps, at least according to Justice Stevens, as with the provi-

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15) (discussing American constitutional context).

18. Hart, *The Concept of Law* at 100-23 (cited in note 3). For application of the idea to the American Constitution and its foundations, see Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 Mich. L. Rev. 621 (1987).

19. U.S. Const., Art. III, § 3, cl. 1.

20. The example is a variation on themes most famously developed in Saul A. Kripke, *Wittgenstein on Rules and Private Language* 7-54 (Harvard U. Press, 1982).

21. See *Monaco v. Mississippi*, 292 U.S. 313 (1934); *Hans v. Louisiana*, 134 U.S. 1 (1890). For discussion, see Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 Harv. L. Rev. 1342 (1989).

sion prohibiting states from "impairing the Obligation of Contracts."<sup>22</sup> Consequently, since such generally accepted textual affronts (or judicial amendments) have been understood to be consistent with the persistence of the remainder of the text itself,<sup>23</sup> it would not be illogical for our fictional textual provision to be interpreted as supporting less judicial interpretive supremacy than the plain language of that text appears to indicate. And if such a textual modification, as with the textual modification of the Eleventh Amendment, would be logically and empirically consistent with the persistence of the balance of the text of the Constitution, it becomes clear that even textual clarity does not preclude a position at odds with what the provision appears to say, and thus leaves open the extra-textual question of whether the fictional text should be interpreted as it reads, or instead should be interpreted to allow more interpretive power to bodies other than the Supreme Court. What counts as law is determined extra-legally, and what counts as the constitution is determined extra-constitutionally, and so the question whether something derogating from what the text appears to say is nevertheless to be considered as legally valid is not a question that can be answered by a recursive reference to the text itself.

Once we comprehend this point in the extreme context of the fictional provision set out above, then the *a fortiori* argument with respect to the actual text becomes apparent. If even such a clear designation of judicial supremacy would leave logically open the question of judicial supremacy, then the question of judicial supremacy is most certainly an open question on the Constitution we actually have, one in which neither the power of judicial review itself<sup>24</sup> nor the question of the judiciary's interpretive authority are addressed at all. On the Constitution we do have, the question of who should interpret it, and the status others should grant to those interpretations, remains stunningly open.

The foregoing explains why we refer to the question we ask as *preconstitutional*, in the logical rather than the temporal

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22. "Unlike other provisions, . . . it is well settled that the prohibition against impairing the obligation of contracts is not to be read literally." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 (1987).

23. To put it differently, no one understands these contradictions of the text as repealing or even replacing the entire Constitution of which the judicially repealed provisions are a part.

24. See John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 Va. L. Rev. 333 (1998); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).



sense.<sup>25</sup> Questions of how we are to read the constitutional text loom outside of and are therefore logically antecedent to the constitutional text, for these are questions that in the final analysis determine what the text is to mean. Indeed, because the preconstitutional questions are essential for constituting not only a nation but also a constitution, there is an important sense in which the preconstitutional questions are constitutive and thus constitutional. To understand the capital "C" Constitution, we must first, and even more importantly, understand the small "c" constitution on whose foundation the capital "C" Constitution rests.<sup>26</sup> And because the question of whose interpretations of the text are to be taken as authoritative is especially important with respect to a text that is both old and often linguistically indeterminate, the preconstitutional question of interpretive supremacy strikes us, and indeed many others, as being the most important of a larger array of preconstitutional questions.

It is for these reasons that we take the illuminating historical and textual analyses of Devins, Fisher, Hartnett, and Harrison to be far less conclusive than they take them to be. The question of how we are to ground the Constitution is preconstitutional and extraconstitutional, and so the question of how we are to understand the Constitution is likewise preconstitutional and extraconstitutional. Our inquiry into whose interpretations, if any-one's, of the Constitution are to be regarded as authoritative and supreme is just this kind of preconstitutional and extraconstitutional inquiry, and thus a historical or textual focus strikes us as missing the point. If when asked why we drive in the direction of the tip of the arrow and not the tail we were to respond that the arrow tells us to go in the direction of its tip, we would be rightfully accused of failing to understand the conditions, external to the arrow itself, that enable us to understand what the arrow means. Similarly, to say that we should look conclusively to the Constitution's text and history to determine what that text and history are to tell us is to make the same conceptual error. Our inquiry is into the conditions that determine what the Constitution is to be understood as meaning, and it will be of no help to presuppose a meaning as a way of answering the question of what the meaning is.

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25. See Richard S. Kay, *Preconstitutional Rules*, 42 Ohio St. L.J. 187 (1981).

26. See Michelman, 74 Notre Dame L. Rev. at 1617-18 (cited in note 15); Frederick Schauer, *Amending the Presuppositions of a Constitution*, in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 145 (1995).

## B. THE NATURE OF THE INQUIRY

Devins, Fisher, Hartnett, and Harrison show that not everyone agrees with us about the preconstitutional nature of the inquiry, but the more substantial disagreement comes once we turn to the nature of the analysis, or the nature of the evidence, that we would use to answer the preconstitutional question about interpretive supremacy. Once we put aside the unhelpfully self-referencing possibility that we should look to the Constitution itself, where should we look for guidance in answering the question about interpretive authority?

Perhaps too casually, we announced in *On Extrajudicial Constitution Interpretation* that our inquiry and analysis was "neither empirical nor historical."<sup>27</sup> Although accurate as a description of what we were doing, in the sense of focusing on logical and philosophical questions of institutional design, the claim has puzzled many of our critics, who ask, rightfully, whether the inquiry can be as non-empirical as we claimed it was. Upon further thought, it is clear to us that the empirical dimension is one that cannot be avoided. Moreover, there is no reason why history might not be one, although only one, component of such an empirical inquiry. This does not change the nature of our claim or the evidence we would use, then and now, to support it, but it does lead us to regret the language we used to describe it, and to regret suggesting that questions of institutional design can be answered in an empirical vacuum.

In describing the inquiry as non-historical, we meant to claim, and still mean to claim, that reliance on the *authority* of history to answer the preconstitutional question has the same status as relying on the constitutional text, and is thus ultimately question-begging. Suppose we were to discover that all fifty-five members of the constitutional convention, as well as a majority of all of the legislatures of the ratifying states, had understood the actual language of Articles III and VI as referring to interpretive exclusivity and interpretive supremacy on the part of the Supreme Court of the United States. In that case, it would be safe to say that James Madison and his compatriots agreed with our claim, but we would nevertheless expressly forego reliance on the proposition that what Madison thought settles the question.

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27. Alexander and Schauer, 110 Harv. L. Rev. at 1369 (cited in note 1).

That what Madison and others thought does not settle the question is premised, again, on the problem of self-reference. Suppose, to vary slightly an example that one of us has used previously,<sup>28</sup> that we were to write a constitution establishing *us*—Larry Alexander and Fred Schauer—as its supreme interpreters, and suppose we were to provide in this document that it would become valid and effective upon our signing of it<sup>29</sup> and upon notice of that signing appearing, as it now is with these very words, in *Constitutional Commentary*. Under these circumstances, our constitution's own internally specified conditions for its validity would have been satisfied, and thus our constitution's own claim to be the Constitution of the United States would be valid according to the conditions contained within the document.

As should be clear, however, the satisfaction of the document's internal and self-specified conditions for its own validity would be woefully inadequate to establish the document as the Constitution of the United States. And that is because a constitution's status as *the* constitution is dependent upon its (empirical) acceptance by a polity as their constitution. Without this empirical acceptance—acceptance as social fact—no amount of formal internal validity will make a document a constitution.

What follows from this is that what makes James Madison's constitution and not Alexander and Schauer's constitution the Constitution of the United States is not something that is contained in the document, and not something that could have been determined in 1787, but is rather something that is determined *now* by the American people. Without the social fact of acceptance by the American people in 2000 that the document that Madison and his compatriots wrote in 1787 is *the* Constitution of the United States, that document is no more authoritative than the constitution that we purported to make effective on the pages of this volume.

If what makes the 1787 Constitution the 2000 Constitution is dependent on 2000 social facts, then so is the 2000 status of what James Madison and the other framers intended in 1787 dependent on a 2000 decision and not on a 1787 decision. The relevance of history is not determined historically, but by a present political and social decision. As a consequence, the determination of 1787 preconstitutional questions is necessarily a non-

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28. Schauer, *Amending the Presuppositions of a Constitution* at 146-47 (cited in note 26).

29. We signed it.

historical question, although it is of course possible that the non-historical question might be answered by *giving* a role to history.

This is the sense in which we claimed that our inquiry was not historical. What Madison thought about the question of judicial supremacy, if indeed he thought about it at all, is no more dispositive than what the text *says* about judicial supremacy, for the point about preconstitutionality is as germane to the question of the authority of history as it is to the authority of the text. Thus, our argument is that the *Cooper* rule is normatively superior to what we tendentiously call institutional anarchy. If the original Constitution lacks the *Cooper* rule, then our claim is that the original Constitution is normatively inferior to a constitution that contains the *Cooper* rule. We could, of course, obtain the *Cooper* rule by amending the Constitution through the formal processes it prescribes in Article V. But that is not what we are advocating. Rather, we are advocating that we obtain the *Cooper* rule (or recognize the existence and validity of the *Cooper* rule) in the same way that we have obtained the original Constitution itself, namely, *by accepting it as authoritative*. In *Cooper*, the Supreme Court ran that rule up the flagpole. If we like it, all we have to do is salute. And it appears that most of us have in fact done so. And if that is so, then that makes the *Cooper* rule as “constitutional” as the Constitution itself.

But if we step back a bit and address the question whether we as a society ought to salute—to extend our metaphor perhaps beyond the breaking point—then we admit that we were perhaps too quick in dismissing the value of history. That history is not authoritative does not make it non-authoritatively irrelevant. Madison and the other framers were smart fellows, and we have much to learn from them, just as we have much to learn from Plato, Aristotle, Confucius, Thomas Hobbes, John Locke, Abraham Lincoln, Elizabeth Cady Stanton, John Rawls, and Frederick Douglass. And we have much to learn from the history of the United States, just as we have much, in the United States, to learn from the history of France, Japan, India, Brazil, and South Africa. But the central point is that what we learn from history we learn because of its content and not because of its authority. That Madison said something ought to be relevant to our inquiry, but it does not come close to settling the question.

Because our preconstitutional question is a question of normative institutional design—of what institutional designs *ought* to be adopted—it would be a mistake to suppose that we could or should engage in this inquiry without reference to facts

about the world. To claim that our inquiry is not empirical was also then and is now a mistake. Rather, the proper claim is that the status of the question—its preconstitutional nature—is itself a logical and not a historical or empirical matter. But once the status of the question is established, and we are then trying to determine whether this or that institutional design is better, it would be folly to ignore the evidence that we might obtain from the external world, including evidence that we might get from history. While inferring that certain sorts of behavior would likely flow from certain incentives and systemic designs is entirely appropriate, we recognize that we should never lose sight of the fact that these are *empirical* inferences, and thus usefully supplemented by and tested against actual evidence of actual behavior, whether that evidence be historical, sociological, statistical, psychological, or otherwise.

## II. THE SETTLEMENT FUNCTION AND ITS OPTIMAL LOCATION

### A. IS SETTLEMENT OVERRATED?

Once we turn from meta-questions about the nature of the question to the question itself, we arrive at our claim that one of the chief functions of law in general, and constitutional law in particular, is to provide a degree of coordinated settlement for settlement's sake of what is to be done. In a world of moral and political disagreement, law can often provide a settlement of these disagreements, a settlement neither final nor conclusive, but nevertheless authoritative and thus providing for those in first-order disagreement a second-order resolution of that disagreement that will make it possible for decision to be made, actions to be coordinated, and life to go on.

But what is so special about settlement? Here our critics come in two varieties. Some, especially Mark Tushnet but most of the others as well, and indeed a vast tradition surrounding them,<sup>30</sup> sees an independent virtue in public constitutional dis-

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30. In describing a huge modern tradition advocating connecting American constitutional law with an argued desirable public discourse (or dialogue, or deliberation, or conversation) about constitutional matters, we could reference literally thousands of books and articles. Among the more prominent or exemplary are Bruce Ackerman, *We the People: Foundations* (Belknap Press, 1991); Levinson, *Constitutional Faith* (cited in note 7); Cass R. Sunstein, *The Partial Constitution* (Harvard U. Press, 1993); Robert Justin Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 Tul. L. Rev. 69 (1991); Frank I. Michelman, *The Su-*

course, and thus sees a virtue in the kind of discourse that will never come to pass without some degree of continuous public dispute and debate about constitutional meaning. For an entire contemporary movement stressing the Constitution as a forum and a focal point for public deliberation, a cardinal virtue of the Constitution is that it provides the locus for desirable public debate about crime control, affirmative action, gender equality, sexual orientation, devolution of authority to the states, presidential conduct, the role of religion in public life, and innumerable other topics that combine undeniable public interest and importance with a plain connection to the kinds of topics that the Constitution designates as fundamental. And if we overly stress the settlement function of the Constitution, so the argument appears to go, we truncate precisely the public debate and deliberation that lies, or should lie, at the heart of the constitutional tradition.

We demur. Although we do not deny<sup>31</sup> the virtues of public discourse, it strikes us as the conceit of American constitutionalists to think that Americans need the Constitution in order to debate affirmative action, criminal justice, abortion, religion and the state, privacy, or capital punishment. These debates have flourished in countries in which there is no single written constitutional document (primarily Great Britain, New Zealand, and Israel),<sup>32</sup> and they have flourished in countries in which the written constitutions have not constitutionalized these particular topics.<sup>33</sup> Although it would take serious comparative deliberative research, using various dimensions of constitutionalism as variables, to answer this question with any authority, and although such research does not yet exist, it appears to us far from certain that a constitution is either a necessary or a sufficient condition, or even a significant causal contributor, to fruitful public debate about matters of great political and moral moment.

To put the point differently, our argument is premised not on the assumptions that agreement is better than disagreement,

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*preme Court, 1985 Term - Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986); Martha Minow, *The Supreme Court, 1986 Term - Foreword: Justice Engendered*, 101 Harv. L. Rev. 10 (1987).

31. At least here. See Frederick Schauer, *Discourse and Its Discontents*, 72 Notre Dame L. Rev. 1309 (1997).

32. See generally S.E. Finer, Vernon Bogdanor, and Bernard Rudden, *Comparing Constitutions* (1995); Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law* (Foundation Press, 1999).

33. See John S. Bell, *French Constitutional Law* (Clarendon Press, 1992).

or that settlement is better than keeping things open, even though both of these are plausible world-views. Rather, our argument is premised on the special functions that *law* serves, and that agreement and settlement appear to be the peculiar and special province of law, and the peculiar and special province of constitutions that have been written down and understood in substantially law-like ways. There are other forms of discourse-focusing public documents, but our argument is premised on there being something important about the difference between the American Constitution and the writings of Confucius or Chairman Mao (to take two prominent examples of discourse-focusing non-legal documents), and about the difference between the Constitution and the Declaration of Independence.<sup>34</sup>

Moreover, although constitutions typically deal with matters of greater moral moment than determining whether people should drive on the right or on the left, to take the classic example of law's coordinating function, the value of settlement for settlement's sake is hardly absent from the functions of a constitution. Although people could well have serious moral and political disagreements about whether to have proportional or "first past the post" representation, about whether there should be an established state religion, about whether there should be trial by jury in civil (or criminal) cases, about whether criminal defendants should be compelled (upon pain of punishment for contempt of court, or a permissible inference of guilt to testify), or about whether Presidents should serve as many four-year terms as the electorate is willing to permit, all of these areas of plausible political and moral disagreement are pretty much settled in the American constitutional text, thus taking them off the agenda, even for those who disagree with the substance of the settlement. The authority of law, when it is taken to be authoritative, provides, for those who disagree with the terms of the settlement, content-independent reason for obeying the terms of

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34. We intentionally use the latter example because Mark Tushnet, especially in Mark Tushnet, *Taking the Constitution Away from the Courts* (cited in note 13), makes special reference to the Preamble to the Constitution and to the Declaration of Independence, notoriously non-legal documents, as for him the desirable focal points for public discourse about foundational values. The examples he wisely picks are consistent with a non-legal focus on constitutionalism, but for us the question remains about whether it is wise or useful to conflate the question of public debate about matters of great importance with the question of constitutionalism. If the two are the same, then Tushnet is right and we are wrong. If the two are different, then the difference must lie somewhere outside of the realm of public discourse, and instead in the realm of constraints on that discourse, or constraints on the products of that discourse.

the settlement even when they disagree with their substance.<sup>35</sup> If, as Justice Brandeis claimed, "in most matters it is more important that the applicable rule of law be settled than that it be settled right,"<sup>36</sup> the settlement *qua* settlement serves important social functions. And as the examples we just gave illustrate, the value of settlement for settlement's sake is hardly absent from the realm of constitutional settlements. Although the argument has been made that the stability wrought by strong precedential constraint is less important in constitutional context,<sup>37</sup> the text of the Constitution itself is strong testimony for Brandeis's view, and for the proposition that the constraints of settlement for settlement's sake are often thought, and were thought by the Constitution's drafters, to be more valuable than the value that comes from greater flexibility in the face of changing facts about the world, and changing views about how we wish to confront those facts.

The examples we have just used, of course, represent a biased sample, for they are all examples in which the constitutional text makes moderately clear what the settlement is. With a text as indeterminate as the American Constitution, however, it is far more common to find disputes with a constitutional dimension in which the text itself provides no settlement for that dispute. Does the establishment clause prohibit teacher-organized non-denominational prayer in the public schools<sup>38</sup> or student-led non-denominational prayer at public school graduations?<sup>39</sup> Does the equal protection clause prohibit states from maintain-

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35. We do not know what to make of Edward Hartnett's claim that we are in some way against disagreement, and that urging obedience is tantamount to condemning disagreement. Hartnett, 74 N.Y.U. L. Rev. at 152-60 (cited in note 12). Nagel also suggests the same thing, although more obliquely. Nagel, 39 Wm. & Mary L. Rev. at 660 (cited in note 12). Perhaps we encouraged their misunderstanding by using the ambiguous words "without regard." Alexander and Schauer, 110 Harv. L. Rev. at 1380 (cited in note 1). Yet just as we can drive at 55 miles per hour while loudly and publicly condemning any speed limit below 70, so too can public disagreement with the Supreme Court's interpretations of the Constitution be understood as entirely compatible with obedience to those interpretations unless and until the Court changes its mind.

36. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); see also *Shedden v. Goodrich*, 8 Ves. 481, 497, 32 Eng. Rep. 441, 447 (1803) ("better the Law should be certain, than that every Judge should speculate upon improvements").

37. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989) (plurality opinion); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401 (1988). See generally Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1 (1989).

38. See *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

39. *Lee v. Weisman*, 505 U.S. 577 (1992).



ing single-sex colleges and universities?<sup>40</sup> Does the Fourth Amendment's warrant requirement prohibit use at trial of probative evidence obtained without a warrant?<sup>41</sup> Does the free speech clause encompass speech explicitly encouraging racial violence?<sup>42</sup> Is capital punishment cruel and unusual, and thus violative of the Eighth Amendment?<sup>43</sup> In the absence of explicit congressional action, may states impose regulations that impose a financial or logistical burden on interstate commerce?<sup>44</sup> Do the exigencies of modern legislative practice allow Congress to delegate legislative responsibilities to administrative agencies,<sup>45</sup> or to truncate the formal process of two-house approval and presentment to the President?<sup>46</sup>

In these and countless other instances, there exists in the United States plausible moral and political disagreement and the absence of a clear textual settlement. In place of this textual settlement, however, we have Supreme Court opinions attempting to resolve the issue, but whose resolutions certainly do not eliminate the underlying disagreement. In such cases, our central claim is that the value of settlement for settlement's sake is such that bodies other than the Supreme Court, especially lower courts, state legislatures, Congress, and the President, ought to take the resolution as authoritative even as these bodies continue to disagree with the substance of the resolution. By recognizing the authority and thus the interpretive supremacy of the Supreme Court, we argue, these other bodies will contribute to stability and social harmony in just the same way that they do when they recognize the authoritative and supremacy of the constitutional text itself. If Bill Clinton recognizes the value of settlement in deferring to the authority of the Twenty-Second Amendment in refusing to run for a third term, then so too, we argue, should he recognize the value of settlement in refusing to sign, for example, a Communications Decency Act explicitly contravening a recent and unanimous Supreme Court interpretation of the First Amendment.<sup>47</sup> If the argument from settlement

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40. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515 (1996).

41. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

42. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

43. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

44. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

45. See *Mistretta v. United States*, 488 U.S. 361 (1989); *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981).

46. See *INS v. Chadha*, 462 U.S. 919 (1983).

47. Compare *Reno v. ACLU*, 521 U.S. 844 (1997), with *Sable Communications v.*

fails, then it is hard to explain most of the Constitution. But if the argument from settlement succeeds, then it is an argument that supports the existence of a single authoritative interpreter as strongly as it supports a single authoritative Constitution.

Although Tushnet takes the strongest position against treating law-based settlement as a transcendent value,<sup>48</sup> Bruce Peabody also takes us to task for overemphasizing it.<sup>49</sup> And although Peabody acknowledges some of our qualifications, he still insists that our celebration of settlement and stability slights numerous other important values, some of which are substantive and some of which are procedural, and which include such worthy goals as creativity and the need to retain flexibility in order to be able to rapidly accommodate to a changing world.<sup>50</sup>

Implicit in our argument, however, is something we should make explicit—we do not believe that law, or courts, or constitutions, are or should be the repositories for all that is good in institutional design. Just as we ought not to design the brakes on a car in order to maximize speed, acceleration, or ease of steering, even as we recognize these other goals as relevant, so too do we rely on the proposition that law-based institutions serve stability and settlement fostering functions more than do other social institutions, and that that is not necessarily a bad way to think about the separation of functions in a complex and differentiated

FCC, 492 U.S. 115 (1989).

48. Tushnet, 39 Wm. & Mary L. Rev. at 952-57 (cited in note 12).

49. Peabody, 16 Const. Comm. at 68-69 (cited in note 12).

50. Peabody also takes us to task for overemphasizing the virtues of obedience to the wrong rule, even as Sherwin, 15 Const. Comm. at 68-71 (cited in note 12), chastises us for shying away from our conclusion and treating judicial decisions as a factor and nothing stronger. Sherman does not have problems with our defense of *Cooper*. Her cavil is with our attempt to reconcile that defense with what we say about Lincoln's obligation to obey the command of the Court in *Dred Scott*. We argue that Lincoln was, or at least could have been, right to disobey the Court, and that this concession does not undermine our defense of *Cooper*. But Sherwin argues that we are then in effect only urging a consideration in favor of obedience, and not a real rule, and that only a real rule can provide the settlement benefits of stability, reliability, and coordination. But although we agree with Sherwin about the necessity of a strong rule, we believe she underestimates the asymmetric nature of authority. The position of the authority and that of the agent subject to that authority are different. An authority's rules claim absolute obedience, and not mere consideration. They demand that the subject obey even if the subject is convinced that the balance of reasons, including the reasons to have the rule and its settlement benefits, favors disobedience. The subject, however, faced with an authoritative rule, cannot alienate her rationality and moral agency, even if the overall results would be better if agents were to do so. There is thus always a gap between the concept of what the authority is right to command and what the subject is right to do. As a result, there appears to be no inconsistency in saying that the Court, from *its* perspective, was right to demand obedience from Lincoln, and that Lincoln, from his, was morally right to disobey.

society. So when we claim that settlement for settlement's sake is the special brief of the law, we do not claim, and should not be understood as claiming, that all social institutions have the same brief as does the law, or that settlement should loom as large in the pantheon of social values as it properly does in that subset of society we call the law. To see judicial supremacy in settlement terms, as we do, is thus to see constitutional law as serving an essentially stabilizing and constraining function. Were stability and constraint not preeminent among constitutional values, we wonder why it is seen as important in the first instance to impose second-order constitutional constraints on first-order political decisions. But if stability and constraint are central to explaining constitutionalism itself, then the argument for a single authoritative interpreter is an argument that flows directly from the deepest values of constitutionalism.

#### B. ARE COURTS THE BEST SETTLERS?

Although Tushnet and Peabody challenge the value we place on settlement for settlement's sake, the complaint that joins all of our critics except Sherwin is that we leap too quickly from the premise that settlement for settlement's sake is a good thing to the conclusion that the courts in general, or the Supreme Court in particular, are the best institutions to serve that function. Settlement may be a good thing, these critics admit, and settlement may even require a single authoritative interpreter, but why does it follow that the assignment should be given to the Supreme Court rather than to some other institution?

The argument comes in two forms. One stresses dialogue between the Supreme Court and Congress and between the Supreme Court and the executive branch. Devins and Fisher in particular offer a defense of a temporary form of what we dismiss as "institutional anarchy," arguing that a much more complex give and take between the Court and the political branches than *Cooper* allows is a good thing. Such institutional anarchy produces better constitutional decisions in the long run, they argue, and thus to increased political stability as a consequence.

We have not performed the full social science examination that would be required to address this thesis fully, and thus we cannot gainsay the Devins and Fisher thesis directly. To the extent that they are making the point that all authority rests fragilely on acceptance by its subjects, and that the content-independent reasons that authority provides are themselves frag-

ile because they are deeply paradoxical, then we agree with them.<sup>51</sup>

If, however, Devins and Fisher are arguing that constitutional issues should not be settled authoritatively because to do so risks undermining the very acceptance upon which authority rests, then we must take issue. The public can and often does accept authoritative settlements, including constitutional ones, with which it vigorously disagrees both in terms of morality and policy and in terms of interpretation of text. For example, neither the early New Deal decisions by the Supreme Court invalidating federal legislation attempting to stem the Great Depression<sup>52</sup> nor the Warren Court decision invalidating school prayers<sup>53</sup> were widely viewed as lacking authority, even though both were extremely unpopular substantively and widely criticized as interpretively erroneous. Authority may rest upon nothing more secure than moment to moment acceptance by those subject to it, but for various reasons this acceptance can weather a considerable amount of deep disagreement over both policy and interpretation. And insofar as the acceptance of the judicial role and the esteem of the judiciary itself may rest more on the substance of its decisions than anything else,<sup>54</sup> then it may also be the case that little in the structure of the Court's role will have a great effect on its degree of acceptance and legitimacy.

It is also important to distinguish among various kinds of constitutional disagreements. When the disagreement is merely with the Supreme Court's interpretation of a constitutional rule and not with the substantive result, where people believe that the Supreme Court's constitutional rule is superior to the actual rule adopted by the framers,<sup>55</sup> then the case for *Cooper* is strong-

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51. Indeed, one of us has stressed this on numerous occasions. See Larry Alexander, *Can Law Survive the Asymmetry of Authority?*, in Linda Meyer, ed., *Rules and Reasoning: Essays in Honour of Fred Schauer* (Hart Publishing, 1999); Larry Alexander and Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. Pa. L. Rev. 1191 (1994); Larry Alexander, *The Gap*, 14 Harv. J.L. & Pub. Pol. 695 (1991); Larry Alexander, *Law and Exclusionary Reasons*, 18 Phil. Topics 5 (1990).

52. E.g., *United States v. Butler*, 297 U.S. 1 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

53. See *supra* note 39.

54. See David Adamany and Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 Law & Pol'y Q. 405 (1983); Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 Am. Pol. Sci. Rev. 1209 (1986); James L. Gibson, Gregory A. Caldeira, and Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 Am. Pol. Sci. Rev. 343 (1998).

55. It may also be important not to overemphasize what the people know or believe about Supreme Court decisions. Cf. Timothy R. Johnson and Andrew D. Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 Am. Pol. Sci. Rev. 299

strongest. This is not to say that the Court should not attempt to interpret the Constitution faithfully, even when it believes the Constitution to be sub-optimal or even mischievous as a matter of morality or policy. It is merely to point out that when the stakes consist only of the correctness of an interpretation of an earlier settlement, the value of settlement appears to outweigh the value of interpretive correctness.

In cases in which a Supreme Court interpretation is believed by the political branches to be not only incorrect but also iniquitous or bad policy, should settlement then take a back seat to substantive correctness? From the standpoint of institutional design, which is the standpoint that pervades our project, we continue to believe that the answer is "no." Many, perhaps most, constitutional issues touch on matters of substantive importance, so that practically all interpretive disagreements with the Court will be accompanied by policy disagreements. That means that without authoritative settlement, most constitutional issues will remain open in the sense that any governmental actor who disagrees with a Supreme Court constitutional decision will feel free, legally and morally even if not always politically or prudentially, to ignore that decision. The police officer who disagrees with the prevailing state of Fourth Amendment warrant law will likely bypass seeking a warrant if he believes he might achieve his ends in doing so; and his chances of doing so will be enhanced if, for example, lower court judges are under no legal obligation to follow Supreme Court decisions with which they disagree. So too with state legislatures that would prefer organized prayer in the public schools, municipalities that seek to regulate indecency as well as obscenity, and the panoply of executive officials who might wish to use their powers to discourage women from having abortions.

Perhaps because of examples like these, none of our critics<sup>56</sup> take the position that lower courts need not follow the Supreme Court,<sup>57</sup> nor even the position, central to Attorney General Meese's claim a dozen years ago,<sup>58</sup> that the states, whether in

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(1998) (salience of Supreme Court activity declines substantially after first decision on highly visible issue).

56. With the possible exception of Hartnett—see Part III *infra*.

57. See John M. Rogers, *Lower Court Application of the "Overruling Law" of Higher Courts*, 1 Legal Theory 179 (1995); cf. Charles Fried, *Impudence*, 1992 Sup. Ct. Rev. 155.

58. Meese, 61 Tulane L. Rev. at 985-86 (cited in note 8); see also Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 Tul. L. Rev. 977 (1987).

their executive, legislative, law enforcement, or judicial capacities, were free to take Supreme Court decisions as being limited to the case in which they arose, and thus not setting out law for other actors. That our critics are unwilling to come out strongly in support of dispersal of the interpretive authority among the 50 states suggests that the debate is narrower than might at first appear, and that our arguments for national interpretive supremacy of the national constitution is well-accepted. Still, Devins and Fisher, Nagel, Peabody, and Tushnet all argue that the need for authoritative settlement does not dictate which institution should possess that authority. A democratically constituted body can settle constitutional issues, they argue, and thus for some or many issues Congress might be superior to a court in performing the settlement function.

One reason for believing that the Supreme Court rather than Congress or the Executive is the best institution to wield the settlement authority, however, is the Court's relative insulation from political winds, a clear virtue unless one holds the view that constitutional interpretation is and should be no more than the expression of contemporary values and policies. And although Nagel, especially, charges us with exaggerating the degree of Supreme Court stability,<sup>59</sup> the question of stability can only be determined by a function that takes into account both the frequency and the degree of variability. Just as house current that moves constantly in a range between 108 and 112 volts is for most purposes more stable than current that is between 109.9 and 110.1 six days out of seven and either 62 or 154 on the seventh day, so too is it a mistake to focus on Supreme Court instability without examining the range within which the Supreme Court is unstable as compared to the range within which the other branches would be unstable. And if Supreme Court instability takes place frequently but within a narrow range,<sup>60</sup> it is a mistake to focus only on the number of changes in Supreme Court doctrine, as Nagel appears to do, without careful examination of the range of this variation compared to the range of variation for the other branches.

Our suspicion, which admittedly would be better bolstered by the kind of careful controlled examination that neither we nor our critics have yet performed, is consistent with the view that

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59. Nagel, 39 Wm. & Mary L. Rev. at 857-60 (cited in note 12).

60. See Vincent Blasi, ed., *The Burger Court: The Counter-Revolution That Wasn't* (Yale U. Press, 1983).

the Court's adherence to precedent<sup>61</sup> allows it to settle constitutional issues more permanently than can the political branches, which have no practice analogous to precedential constraint. But even if the best institutional design would exempt the Court from the obligation to follow its own precedents,<sup>62</sup> the Court would still be superior to the political branches as the institution to exercise the settlement authority. There are established and constraining procedures through which constitutional issues are brought before the court, but no comparable procedures exist for bringing such issues before the political branches. The Court issues opinions along with its decisions, but the political branches do not (although they could). The Court has only nine members, and they serve for life. The Court cannot pick its agenda, although Congress can. Whether in the final empirical analysis these and other features make the Court more stable than Congress or more stable than the executive branch is more of an empirical question than we first acknowledged, but in default of the

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61. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 138-39 (Princeton U. Press, 1997); Tribe, 1 *American Constitutional Law* at 82-85 (cited in note 9); Henry Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988).

62. Should the Supreme Court itself be subject to the *Cooper* rule? Put differently, should a decision by the Court that it now believes to be mistaken nonetheless be taken as having permanently settled the issue? How strong a doctrine of horizontal precedent should apply to the Court's constitutional decisions?

There are three principal positions one can take on this matter. First, one can argue that the *Cooper* rule should apply full force to the Court itself. Once the Court decides a constitutional matter, it is settled for all time. No matter how mistaken a constitutional interpretation the Court now believes its earlier decision to have been, and no matter how mischievous or iniquitous, the earlier decision is as authoritative as the Constitution for the Court as well as all other officials.

The second position is at the opposite end of the spectrum. The Court might be the one institution exempt from the *Cooper* rule. If it believes an earlier constitutional precedent to have been mistaken, it is free to overrule it.

The third position would allow the Court to overrule precedents only if the precedents were both erroneous as constitutional interpretations *and*, in the Court's opinion, unjust or mischievous. In other words, constitutional error would be a necessary but not sufficient ground for overruling precedent.

The first position exalts settlement over all opposing values. The Court gets one shot at correctly interpreting particular constitutional provisions. The only cure for Supreme Court error would be the lengthy and difficult course of constitutional amendment.

The second position, however, does not prize settlement enough. We are attracted, therefore, to some variant of the third position, which gives the Court a safety valve against harmful constitutional errors. Of course, the third position has its downsides. Unlike the other positions, in which the Court must follow the Framers or follow its prior decisions attempting to follow the Framers, the third position requires the Court to make first-order judgments of morality and policy. Moreover, it sacrifices some settlement value and also allows some constitutional error. For these reasons, our endorsement of the third position is less than wholehearted and quite tentative.

kind of non-anecdotal evidence that would approach settlement of *this* question, we remain unpersuaded that, if settlement is a substantial goal, that we will get more settlement for settlement's sake from Congress than we will get from the Supreme Court.

### III. WHAT IS THE SUPREME COURT FOR?

Undergirding many of the criticisms is a vision of the Supreme Court as a case-decider and not a law-maker. This vision, consistent with a classical view about the functions of the courts but not necessarily invalid because of that provenance, is most explicit in Hartnett's critique, for to him what courts do is decide specific cases.<sup>63</sup> All the rest, including the opinions, is gravy. For Hartnett the decision of cases, and not the giving of opinions, is at the core of the judicial function, and since our whole position rests on the way in which opinions might be thought to give some guidance, it rests on a misunderstanding, he argues, of the nature of adjudication. And, Hartnett supports his view with an impressive demonstration of the historical view that the Supreme Court was from the founding conceived as a case-decider and not as a law-maker or opinion-giver.

We will not dispute Hartnett's history, but as with Devins and Fisher's history, we have a different view about the status of that history. So if we take the history as interesting but not determinative, we might then ask about what vision of what the Court should be doing is most consistent with our view of the settlement function. And here we admit that we do not find it irrelevant that last year the Supreme Court carefully considered, by its own definition of careful consideration implicitly built into the *certiorari* process and procedures, only 94 cases, as compared with the 7015 it was asked to carefully consider, but chose not to.<sup>64</sup> If the Supreme Court is primarily a case-decider and only secondarily, at best, an opinion purveyor, it appears to have achieved a level of inefficiency unmatched in any other govern-

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63. See Hartnett, 74 N.Y.U. L. Rev. at 126-36, 146-58 (cited in note 12). A similar claim makes a brief appearance in Devins and Fisher, 84 Va. L. Rev. at 91 (cited in note 12). See also Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 Geo. L.J. 347, 349 (1994) (federal courts decide cases and do not expound the law); Thomas Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L. Rev. 43 (1993); Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1006 (1965) (Supreme Court functions stem from its responsibility to decide concrete cases).

64. *The Supreme Court, 1998 Term - The Statistics*, 113 Harv. L. Rev. 400, 407 (1999).



ment agency we know of.<sup>65</sup> If the Supreme Court processes only 1% of its caseload in order that it might make good decisions in that 1%, and in order that it might surround those decisions with opinions that, according to Hartnett and others, do not much matter, the time has come for major reconsideration of the Court's role and its methods of operation.

Such reconsideration might be in order, we believe, but not because the Court is doing too much opinion-writing. On the contrary, on our view it is not doing enough, or it is not doing it well enough.<sup>66</sup> The vision of the Court as constitutional interpreter, which is our vision, as opposed to the vision of the Court as dispute settler, which is Hartnett's, is a vision that sees the Court being much more concerned with instructing, guiding, helping, and, indeed, ordering other bodies and other branches than the volume and style of its current output would suggest.<sup>67</sup> And if these are or should be the Court's concerns, then we would expect to see more clear rules, fewer divided judgments without a majority opinion, more concern by the Justices for the Court speaking with a single voice than with making their own points or even with insisting on their own view about the outcome,<sup>68</sup> even more concern with *stare decisis*, and in general more Supreme Court behavior befitting the law-maker that the Supreme Court undeniably is, and in our judgment inevitably must be. The strongest argument for Hartnett's position is not

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65. Samuel Estreicher and John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681 (1984), argue that the Supreme Court should see itself more than it does as a manager of a system of courts. We do not disagree with this, but offer the more radical proposal that the Court should also see itself as a manager of constitutional signals and a manager of a system of constitutional compliance.

66. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 807-11 (1982); Frederick Schauer, *Opinions as Rules*, 62 U. Chi. L. Rev. 1455 (1995).

67. Our view is largely consistent with that in David G. Post and Steven C. Salop, *Issues and Outcomes, Guidance, and Indeterminacy: A Reply to Professor John Rogers and Others*, 49 Vand. L. Rev. 1069 (1996). See also Lewis A. Kornhauser and Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1 (1993); David G. Post and Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 Geo. L.J. 743 (1992). On these and related issues, see generally Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 Mich. L. Rev. 2297 (1999).

68. See John M. Rogers, "Issue Voting" by Multimember Appellate Courts: A Response to Some Radical Proposals, 49 Vand. L. Rev. 997 (1996); John M. Rogers, "I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides, 79 Ky. L.J. 439 (1990). In ultimately agreeing with our position about *Cooper*, Suzanna Sherry takes our position, correctly, as suggesting that individual Justices of the Court should take themselves in many contexts (such as that presented in *City of Boerne*) as being as bound by the Court's decisions as they expect other officials to be. Sherry, 39 Wm & Mary L. Rev. at 904 (cited in note 13).

his historical analysis, which again we believe correct but largely beside the point. Rather, it is the nature of the Court's current performance as rule-maker. If the authoritative interpretation of authoritative rules is a rule-making function, which we believe it is, then much of the Court's methods of operation would need to be revamped.<sup>69</sup> In that sense, Hartnett's most persuasive claim, even if not one he makes explicitly, is that under his vision the Court can proceed as it is now, and under our vision it needs to spend much more time thinking about how it can give better guidance to Congress, to the executive, to lower courts, and to the states.<sup>70</sup>

We have dismissed as being no more relevant than original intent the Court's own assertions of its own interpretive supremacy, arguing that this form of bootstrapping could not answer the question of whether the Court's assertions of interpretive supremacy should be respected by other branches, and supported by extra-judicial political incentives.<sup>71</sup> But in another sense the Court's own assertions are highly relevant. If the Court itself purports to be a guider of other officials and other branches, which is what its own statements in *Cooper* and *City of Boerne* appear to assert, then the Court's performance may properly be

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69. We do not accept Hartnett's view that the courts "have little business decreeing" rules. Hartnett, 74 N.Y.U. L. Rev. at 149 (cited in note 12). Nor do we agree with him that an opinion (a reason) cannot be followed. As a statement of what should happen in a class of cases, of which the instant case is one, a reason is essentially a rule, see Frederick Schauer, *Giving Reasons*, 47 Stan. L. Rev. 633 (1995), and can be followed just as a rule can be followed. "I hold in your favor because people have a right to protest in public parks" is a reason, but it is also a rule that protesting in public parks must be permitted. For us, the Supreme Court decrees rules whenever it gives a reason for its decision, and thus whenever it writes an opinion. To suggest that the Court should get out of this business is truly the radical approach, and our more modest suggestion is only that the Court acknowledge the rule-making in which it is inevitably engaged, as a first step towards doing better what it is now doing, and has been doing for centuries.

70. This might also be an argument, were we starting anew, for a much less opaque constitutional text. Although the new 114-page Constitution of the Republic of South Africa and the new 211-page Constitution of the Federative Republic of Brazil might be extreme examples, it is instructive that in all of the constitution-making now going on throughout the world, no nation has chosen a written constitution anywhere as brief and cryptic as that of the Constitution of the United States. Much of this is likely due to the fact that the Constitution of the United States was made in secret and most modern ones, and especially the two we just noted, were made under very public conditions in which the political incentives favored wholesale inclusion of a wide variety of rights, interests, and values. But part of it may also be due to an increased recognition that if a Constitution is to serve as law, then it should come as no surprise that it will look like law as well.

71. Such as political liabilities for elected officials who disregarded even unpopular Supreme Court decisions, liabilities that plainly do not exist in the current political environment in which elected officials and their subordinates operate.

measured against its own announced statement of its function.<sup>72</sup> And by the definition of the function that it has announced and we, here and earlier, have supported, the Court plainly has a long way to go.

It may appear that imagining this role for the Court runs afoul of the prohibition on advisory opinions,<sup>73</sup> but if the ban on advisory opinions were understood as preventing useful statements about the law unnecessary to the result in the case the Court would do nothing except announce judgments, possibly—and only possibly—coupled with a statement of the facts of the case. Once the Court goes beyond this, whether we call what the Court does giving an opinion, giving reasons, or offering dicta, it is in the business of giving advisory opinions. There may be good Article III reasons for prohibiting the Court from doing this except in the context of a particular case or controversy,<sup>74</sup> but once a case or controversy exists it is too late in the day to eliminate the full array of reason-giving practices in which the Court is engaged, practices that necessarily “decide” cases other than the one before the Court because the logical nature of a reason makes it broader than the outcome that the reason is a reason for. So if the Court is already and necessarily in the business of giving advice in its opinions—advisory opinions—then it is only the smallest of steps to imagine that it could consider more seriously than it has to date how it might perform this function more effectively.

## CONCLUSION

It is fashionable to dismiss John Marshall’s claim that the province of the judiciary is “to say what the law is”<sup>75</sup> as typical Marshallian hubris,<sup>76</sup> unnecessary to the result in *Marbury*, un-

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72. For an important exploration of the ways in which courts might serve this function more effectively, see Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 Minn. L. Rev. 1 (1998).

73. See Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997 (1994); Oliver P. Field, *The Advisory Opinion—An Analysis*, 24 Ind. L.J. 203 (1949); Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002 (1924). A useful survey of state practices is Paul C. Clovis and Clarence M. Updegraff, *Advisory Opinions*, 13 Iowa L. Rev. 188 (1928).

74. See Krotoszynski, 83 Minn. L. Rev. at 19-23, 30-39 (cited in note 72); Evan T. Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 605 (1992).

75. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

76. Cf. Nagel, 39 Wm. & Mary L. Rev. at 850 (cited in note 12) (describing judicial assertions of interpretive supremacy as exercises in “self-importance”).

supported by the Constitution, and unwise as a matter of policy. Yet if a multiplicity of bodies says what the law is, then there is likely to be a multiplicity of laws, or, more precisely, a multiplicity of interpretations of the same law. And if, as Lon Fuller maintained, knowing what the law is and knowing how to comply are necessary conditions for legality itself,<sup>77</sup> then multifarious law and multifarious interpretation are at odds with the rule of law itself. Although diversity of opinion is a valuable social phenomenon, law exists primarily because diversity of opinion and diversity of action may sometimes produce more harm than good. When we value coordination and settlement more than we value diversity, we employ law, and John Marshall's claim is nothing less than the observation, later refined by Fuller, that without a single and authoritative interpreter there would be little difference between law and the numerous non-enforced directives we find in philosophy books and advice columns.

As a judge, Marshall not surprisingly moved too quickly from the need for a single authoritative interpreter to the claim that the judiciary was the only institution that could serve this role. But although there are other candidates, none of them contain the institutional constraints that could enable them to speak with the same degree of consistency as the Supreme Court. As long as this is so, and there is no evidence that it is not,<sup>78</sup> then it will and should be the function of the Supreme Court to say what the law is. For those arguing to the Supreme Court or evaluating its work, there will always remain some conceptual space between what the Supreme Court says and the law the Court purports to interpret. For those to whom the Supreme Court speaks, however, the functions of law have been better served, and will be better served in the future, if the Constitution is what the Supreme Court says it is.

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77. See Lon L. Fuller, *The Morality of Law* (Yale U. Press, 2d ed. 1969).

78. One of the most valuable products of this exchange between us and our critics, we hope and believe, is that it has sharpened the nature of the empirical question that lies at the center of the debate, at least at the center of the debate between us and those who would locate in Congress the role of the single authoritative interpreter. As Peabody properly observes, Peabody, 16 Const. Comm. at 85-90 (cited in note 12), the debate may provide the springboard for the kind of serious empirical research on this question that has yet to take place.